

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

MOTION OF RESPONDENT COOLEY FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, RONALD CLIFTON COOLEY, by his attorney, ROBERT A. ROBBINS, JR., asks leave to file the attached Brief in Opposition in unprinted form and to proceed in forma pauperis pursuant to Supreme Court Rule 53.

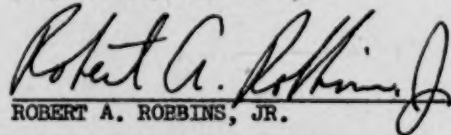
As grounds for this motion, the respondent states the following:

1. He is presently an inmate at the Federal Correctional Institution, Lewisburg, Pennsylvania.

2. He was found guilty in the United States District Court for the District of Columbia of escape from the custody of the Attorney General, 18 U.S.C. § 751(a), and was sentenced to a maximum of five years in prison, to be served consecutively to any previous sentences. The United States Court of Appeals for the District of Columbia Circuit reversed his conviction and remanded for a new trial. The United States has filed a Petition for a Writ of Certiorari to that court with respect to its decision.

3. The respondent has been represented in the courts below by court-appointed counsel. The undersigned attorney was appointed by both the district court and the court of appeals, pursuant to the Criminal Justice Act, to represent him at trial and on appeal, respectively. See 18 U.S.C. § 3006A(a)(6).

Respectfully submitted,


ROBERT A. ROBBINS, JR.

1518 R Street, N.W.
Washington, D.C. 20009
(202) 452-4356

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT COOLEY IN OPPOSITION

ROBERT A. ROBBINS, JR.

1518 R Street, N.W.
Washington, D.C. 20009
(202) 452-4356

Counsel for Respondent
(Appointed by the United
States Court of Appeals
for the District of
Columbia Circuit)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT COOLEY IN OPPOSITION

The respondent Ronald Clifton Cooley respectfully requests that this Court deny the United States' petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinions in this case. Those opinions are reported at 585 F.2d 1087 (1978), and at 585 F.2d 1130 (1978).

QUESTIONS PRESENTED

For purposes of this response, the respondent does not seek to rephrase the questions presented by the Government in its petition. His disagreements with those questions are so closely tied with the reasons for denying the writ

that they are discussed below. Should this Court grant review, however, the respondent would seek to defend the judgment of the court of appeals -- reversing his conviction and remanding for a new trial -- by raising the following question:

Did the trial court impermissibly invade the province of the jury with its instruction on the custody element of the offense escape from custody of the Attorney General, 18 U.S.C. § 751(a)? 1/

1/ The trial judge gave the following instruction at the close of the trial:

Now, with respect to each of the defendants who is on trial in this case the Court instructs you that defendants convicted either in this federal court or in the Superior Court of felonies, or in federal courts throughout the country are committed to the custody of the Attorney General of the United States. This is a general practice and the Court will take judicial notice of it and instruct you accordingly.

Prisoners, such as two of the prisoners in this case, defendants in this case who are convicted in another jurisdiction and who were in the custody of the Attorney General, were brought to this jurisdiction as the documentary evidence shows, because they were summoned as witnesses by another defendant in a preceding then pending in the District of Columbia court. They are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia Jail.

(Tr. 800-801.) The court of appeals said of the first paragraph: "[W]e think it unlikely that the jury was [thereby] confused." (Pet. App. 30a, n. 58.) But after rejecting the claims of respondents Cooley, Bailey and Walker as to the sufficiency of the evidence, the court said, with a footnote reference to the language in the second paragraph:

Although the trial judge's instructions matched the general sense of our holding, we recognize that some portions of the instructions on this matter were confusing and might have invaded the province of the jury. We assume, however, that any such deficiencies in the instructions will be cured on remand.

(Pet. App. 34a, footnote omitted.) As the court's language indicates, the instructions took away from the jury the factual determination of whether the respondents were in the custody of the Attorney General at the time of the "escape" -- an essential element of the crime. (Pet. App. 27a.) This is true with respect to respondent Cooley even though the second paragraph of the above instruction is intended to refer to Bailey and Walker. The general sense of the two paragraphs when read together -- and especially when read in light of the minimal, documentary evidence offered by the government to prove its case, see "Statement of the Case," *infra* -- is this: Regardless of how a defendant gets to the D.C. Jail, he is still in the custody of the Attorney General at the time of an "escape" if he was originally committed to that custody.

Because the trial court directed the jury that the government had proved an essential element of the offense, it impermissibly invaded the province of the jury. *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593 (1896). This Court should affirm the judgment below, regardless of what action it takes on the issues raised by the United States in its petition.

STATEMENT OF THE CASE

Respondent Cooley was indicted, along with Clifford Bailey, Ralph Walker, and James T. Cogdell, for wilfully escaping from the custody of the Attorney General on or about August 26, 1976, in violation of 18 U.S.C. § 751(a), and for prison breach, 22 D.C. Code § 2601. Mr. Cogdell's trial on these charges was severed from that of the other defendants.

At the joint trial, the government introduced the following evidence -- and only the following evidence -- in its effort to make out a prima facie case against Mr. Cooley: 2/ (1) a "face sheet" which indicated that he was committed to "D.C. Jail" on April 10, 1976, as a "federal prisoner" (Government Exhibit No. 8); (2) a Judgment and Commitment Order which indicated that he was "committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years" on May 20, 1976 (Government Exhibit No. 2); (3) an Escape and Apprehension Report dated August 26, 1976, which noted that he had "escaped" from the "Dist. of Col. Detention Facility" on that date; (4) the testimony of the Supervisor of Records at the "New Detention Facility" that there was no record of Mr. Cooley's being released from the facility before August 26 (Tr. 17-18, 27-28); and (5) the testimony of a special F.B.I. agent that he assisted in the arrest of Mr. Cooley on September 27, 1976, at 4229 2nd Place, N.E., in the District of Columbia (Tr. 65).

Respondent Cooley, testifying in his own behalf, indicated that correctional officers beat him a number of times during the weeks immediately preceding August 26 (Tr. 402-405); that he complained about this situation to prison officials and to a D.C. Superior Court judge, but that he felt nobody believed him (Tr. 404-405); that his codefendants forced him to leave the jail on August 26 (Tr. 406); that their threats and his general treatment at the jail operated on his mind as he left the institution (Tr. 424); and that

2/ The evidence against the other respondents was similar in the sense that it was primarily documentary.

although his family attempted unsuccessfully to contact the authorities following his escape, he refrained from doing so himself because he knew no one to call, he knew he was disliked in jail, and he feared both the guards back in jail and the people who would pick him up if he turned himself in (Tr. 407-408, 425-426).

Other witnesses testified to beatings they saw guards inflict on Mr. Cooley and to injuries that he had which could have resulted from these beatings (Tr. 169-172, 372-375, 382-390, 552-555, 605-608, 630, 631). Testimony also showed that fires were set in the cellblock which housed the respondents, as often as once a day (Tr. 150).

At the close of all the evidence, the trial judge refused to give the jury either the "duress" instruction proposed by the respondents or the one he had prepared himself. His sole stated reason for not giving an instruction was the respondents' failure to notify the authorities of their whereabouts or to turn themselves in (Tr. 725). Instead, the judge instructed the jury not to consider the respondents' evidence (Tr. 806), and also instructed it that escape is a "general intent" offense (Tr. 803).

The jury then returned verdicts of guilty against the three jointly tried respondents on the federal escape charges, and therefore, pursuant to the judge's instruction (Tr. 804), did not reach the D.C. Code charges. 3/

The court of appeals, with one judge dissenting, reversed these convictions and remanded for a new trial. 4/

REASONS FOR DENYING THE WRIT

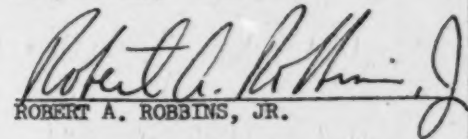
Respondent Cooley wishes to refer the Court to the reasons stated in respondent Walker's Brief in Opposition, which this respondent adopts by reference.

3/ The outcome of respondent Cogdell's subsequent trial was the same.

4/ For respondent's interpretation of the court of appeals' decision see respondent Walker's discussion of it in his "Reason for Denying the Writ," which this respondent adopts, *infra*.

For the reasons contained therein, the petition for a writ of certiorari should be denied.

Respectfully submitted,


ROBERT A. ROBBINS, JR.

1518 R Street, N.W.
Washington, D.C. 20009
(202) 452-4356

Counsel for Respondent Cooley
(Appointed by the United
States Court of Appeals for
the District of Columbia
Circuit)